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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PETITIONER,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY,
RESPONDENT.

MOTION AND PETITION FOR WRIT OF CERTIORARI.

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W. E. CULLEN,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel.

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RESPONDENT.

Comes now The Montana Mining Company, Limited, by Charles J. Hughes, Jr., W. E. Cullen, Aldis B. Browne, and Alexander Britton, its counsel, and moves this honorable court that it shall, by certiorari or other proper process directed to the honorable the judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said court to certify to this court, for its review and determination, a certain cause in said court of appeals lately pending, wherein the said The Montana Mining Company, Limited, was plaintiff in error and the said The St. Louis Mining and Milling Company of Montana was defendant in error; and to that end it now tenders herewith its petition and brief upon the certified copy of the entire record in said cause in said court of appeals and now here before this honorable court in the said cause numbered 402 on the docket of this court.

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED, PETITIONER,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, RESPONDENT.

The petition of the above-named The Montana Mining Company, Limited, respectfully shows and states:

1. That at all times hereinafter mentioned your petitioner was, ever since has been, and yet is a corporation duly incorporated and organized under the laws of the Kingdom of Great Britain, and as such corporation and by virtue of its compliance with the laws of the Territory and State of Montana was and is duly authorized to carry on and conduct the business of mining for the precious metals in said State, and to have, own, possess, and enjoy mines, mining claims, and other real estate in said State of Montana.

That The St. Louis Mining and Milling Company of Montana (hereinafter in this petition, for brevity, called the St. Louis Company) is likewise, as your petitioner is informed and believes, a corporation duly organized under the laws of the State (then Territory) of Montana.

The Original Complaint.

2. That heretofore, to wit, on or about the 16th day of September, A. D. 1903, the aforesaid The St. Louis Company commenced an action in the Circuit Court of the United States for the Ninth Circuit, District of Montana, against your petitioner and Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Francis Howkins; that all of said defendants except your petitioner were at the date of the commencement of said action and the service upon them of the summons therein residents of the town of Marysville, Montana, and citizens of the State of Montana. In said complaint it was alleged that the plaintiff therein, the said The St. Louis Company, was the owner of, in the possession of, and entitled to the possession of the St. Louis Quartz Lode mining claim, situate in Ottoway mining district, in the county of Lewis and Clark, State of Montana, particularly describing the same by metes and bounds and deraigning its title thereto from one Charles Mayger, who, as it was alleged, had obtained a United States patent therefor and subsequently deeded the said claim to the said The St. Louis Company; and it was therein alleged that the said The St. Louis Company was the owner, in possession of, and entitled to the possession of all the veins, lodes, or ledges having their tops or apexes or "having *any part* of their tops or apexes" within the surface boundaries of the St. Louis mining claim, as thereinbefore described, as against the said defendants, with the right to follow the same on the dips or angles thereof laterally from the place of intersection of any portion of the tops or apexes of said veins with the side lines of the surface location of its said mining claim, ascertained and defined by vertical planes extended downward parallel with the end of its said mining claim at the place of intersection thereof with any portion of said tops or apexes of such veins, lodes, or ledges.

It was further alleged that said defendants, on or about the 30th of June, 1893, had wrongfully, unlawfully, and wilfully entered upon one of the veins, lodes, or ledges bearing gold, silver, lead, and other precious metals and so having its top or apex within the surface location of the said mining claim of plaintiff and within the vertical planes aforesaid, and which said vein or lode, having continued in its strike for some distance parallel with the said boundaries aforesaid, passed out of the eastern side line of said mining claim, and which vein had its dip or angle in an easterly direction and in its course passed outside of vertical planes extended downward upon said east line of said mining claim near the southern portion thereof, and in its dip or angle entered beneath the property claimed or pretended to be claimed by the defendants or some of them, and that in utter disregard of the right and title of plaintiff the said The St. Louis Company, the defendant, had been and then was extracting and taking therefrom large quantities of quartz rock and ore bearing gold, silver, lead, and other precious metals, and converting the same to its own use and benefit, to the damage of the plaintiff, the said The St. Louis Company, in the sum of two hundred thousand dollars.

And your petitioner further shows that there was no allegation of the diverse citizenship of the parties to said action contained in said complaint, nor did such diversity of citizenship exist as between the said The St. Louis Company and said defendants, with the exception of your petitioner, all of the personal defendants being, as aforesaid, citizens of the State of Montana, of which said State the said The St. Louis Company was likewise a citizen; and so your petitioner on its information and belief says and alleges that the said The St. Louis Company did not invoke the jurisdiction of the said circuit court by reason of the diverse citizenship of the parties, but because the determination of the issues in said complaint offered and the rights claimed, and the rights of the parties thereto could only be determined by the proper

construction and application of a statute of the United States, to wit, the Mineral Lands Act.

Amended Complaint.

3. The said The St. Louis Company, on motion and by leave of court, filed an amended complaint in said action on or about the 21st day of November, 1898. In this amended pleading the personal defendants were omitted from the title and your petitioner alone was charged with the trespass complained of in the original complaint. It contains the same general allegations of ownership of the St. Louis claim as are found in the original complaint, but only asserts ownership of such quartz mineral bearing rock or ore as may be found in such veins "the tops or apexes of which lie within the surface lines of the said *fractional* portion of said St. Louis Lode mining claim." It then proceeds to describe its St. Louis claim by metes and bounds, as in its original complaint, and from its general claim of ownership of surface and mineral contents of the ground it makes the following exception:

> "Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis Lode mining claim is described as follows, to-wit:
>
> "Commencing at a point from which the centre of the discovery shaft of the Nine Hour lode bears south thirty-nine degrees thirty-two minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners 2 and 3 fifty feet distant; thence north fifty degrees twenty-eight minutes east on a line parallel to the aforesaid boundary line of the St. Louis lode between corners 2 and 3 thereof, two hundred and twenty-six feet to a point on the boundary line of the St. Louis lode between corners 1 and 2; thence south twenty degrees twenty-

eight minutes west along said boundary between corners 1 and 2 sixty and five-tenths feet to corner No. 2 of the St. Louis lode; thence south fifty-one degrees thirty minutes west four hundred and three feet to corner No. 3 of said St. Louis lode; thence north forty-five degrees thirty minutes west along the line of boundary of the said St. Louis lode between corners 3 and 4 thirty feet to a point; thence north fifty degrees twenty-eight minutes east along a line parallel to the boundary line of the St. Louis lode, between corners 2 and 3, two hundred and thirty feet to the point of beginning, including an area of about 12,844.50 square feet, *together with all minerals contained therein.*

"That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode mining claim, situate and being east of the said St. Louis Lode mining claim and including the thirty-foot strip or compromise ground aforesaid."

A further amendment was to describe, with reasonable accuracy, the vein it was claiming the right to pursue, beyond the side line of its claim extending downward vertically and into and under the compromise ground just described. In doing so it shows with definiteness and certainty the federal questions in the case by virtue of which it invoked federal jurisdiction of its case. It shows that the top or apex of the vein in which it claims extralateral rights enters the east line of its claim at a point 520 feet southerly from the northeast corner or survey corner No. 1 of its claim; that it continues along the east side line of its St. Louis claim between its survey corners Nos. 1 and 2, and passes out of its said claim through the west line of the compromise ground, and that at a point on said line 108 feet southerly from its survey corner No. 2 the hanging wall of said vein cuts said west line of the compromise ground, and the top or apex of the vein begins to pass out of the St. Louis claim; that it, The St. Louis Company, has a part of such apex for

an additional twenty-five feet southerly along said west line of the compromise ground, at which point the foot wall of the vein cuts said line and the top or apex of the vein has passed wholly outside the surface boundaries of its St. Louis claim. In short, it defined in part at least two of the federal questions there were in the case, by virtue of which it had originally sought federal jurisdiction of its case. No discovery or other vein was shown to exist within the surface boundaries of the St. Louis claim, either by the allegations of the pleading or by the map or diagram attached to it, showing the entry and departure of both the foot and hanging walls through the east boundary line of the claim. It clearly showed that from the beginning the plaintiff claimed extralateral rights on a vein which entered its claim and departed therefrom through the same boundary line; that it passed out of its claim at an acute angle, and that it was claiming the right of extralateral pursuit for a distance of twenty-five feet where it did not have the whole of the apex within its surface boundaries; that from its so-called 108-foot plane it claimed the right to take the vein on its strike from that point to a point where a line drawn at right angles to the strike of the vein would intersect the foot wall, and that it also claimed the right to take from your petitioner and appropriate to its own use so much of the surface of the compromise ground as would be embraced in a triangle whereof the west line of the compromsie ground would be the base, the line of the foot wall the perpendicular, and a line drawn from the 108-foot plane to the foot wall at right angles to the strike of the vein would be the hypothenuse, embracing an area of about 186 square feet.

The Compromise Ground.

4. That portion of the St. Louis claim which in said amended pleading is referred to as being "that portion thereof known as the thirty-foot strip or compromise ground" originated in this way. The St. Louis lode was located

by Mr. Charles Mayger on the 28th day of September, 1878. It was of statutory regulation size, a parallelogram fifteen hundred feet in length by six hundred feet in width. A copy of the declaratory statement, which was filed for record, appears in the transcript of record in case 402 of October term, 1906, of this court, which is a case in error wherein your petitioner is plaintiff in error and the said The St. Louis Company is defendant in error. Reference to this declaratory statement, which is found on pages 38 and 39 of said transcript of record, shows that, as originally staked and located, the claim was a four-sided figure; it had four corners and no more. Where these four corners were originally placed by Mr. Mayger is also shown by the diagram of the claim found in the patent for it. A copy of the diagram appears in the transcript of 402 opposite pages 40 and 140. They are alike, except that the one opposite page 140 of the record is on a larger scale. Turning to it, a dotted line will be noticed extending southerly or southwesterly from the northwest corner of the claim to a point marked "Loc. Cor."

That was the northwest and the southwest corners of the claim as originally staked, and the east line was parallel to it and not to exceed 600 feet east of it, or farther up the hill. The diagram shows the northwest and northeast corners to be in place—that is to say, original location corners—and the distance between them is 579 feet. The southern line parallel to this could not have been much longer, and in no event could have exceeded 600 feet in length.

Your petitioner further shows that after the location of the St. Louis mining claim the predecessor in interest of your petitioner discovered, staked, and had recorded the "Nine Hour mining claim;" that the same was so located to the east of said St. Louis claim, the westerly side line of the Nine Hour being fifty feet east of the east line of the St. Louis at the northerly end of the Nine Hour claim and twenty-five feet east of the east line of said St. Louis at the south end of the said St. Louis claim—that is to say, there

was a strip of unclaimed territory fifty feet at the north end and twenty-five feet at the south end lying between the east line of the St. Louis and the west line of the Nine Hour, as the claims were originally staked; that prior to the survey for patent the southeast corner stake of the St. Louis was moved and planted on the Nine Hour ground at a point where dotted projection of the line between corners No. 1 and 2 would meet the dotted line from where the southwest location corner is shown to have stood on the diagram before referred to opposite page 140 of the transcript in 402; that when the survey for patent of the St. Louis claim was made it was started at the northeast corner of said claim and was run toward the point at which the southeast corner stake of the St. Louis claim had been wrongfully and fraudulently removed to, as aforesaid, for a distance of 1,097 feet, to the point marked on said diagram "Cor. 2;" that at the point last aforesaid a mineral corner was put in where no stake or monument of any kind had ever stood before and was marked as corner No. 2 of the St. Louis survey; that at said corner No. 2 an angle or turn to the west was made and corner No. 3 of said survey was put in on the Nine Hour ground. In this way the St. Louis was made to overlap the Nine Hour to the extent of 1.98 acres, and included in such overlap was more than 600 feet of the apex of the Drum Lummon lode (Trans. of Record 402, pp. 63, 64).

Thereupon, and when application was made in the United States land office to enter the said St. Louis mining claim, the said William Robinson and others, predecessors in interest of your petitioner, filed an adverse claim for the said area which had been so wrongfully included, as aforesaid, within the boundaries of the St. Louis mining claim, and thereafter, and within the time allowed by law therefor, commenced an action in the District Court of the First Judicial District of the State of Montana within and for the County of Lewis and Clark, against the said Charles Mayger

for the purpose of determining the right to the possession of the area so in conflict.

That thereafter and on or about the 7th day of March, A. D. 1884, the said suit was compromised by an agreement between the parties that the St. Louis claim should go to patent as surveyed, and that when patent was obtained for the same the said Charles Mayger should and would deed to the said Robinson *et al.* a strip of ground between corners No. 2 and 3 as surveyed, said strip being particularly described as follows:

> "Commencing at a point from which the centre of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners 2 and 3, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim between corners 2 and 3, 226 feet to a point on the boundary line of the St. Louis Lode claim between corners 1 and 2; thence south 20 degrees 28 minutes west along said boundary line between corners 1 and 2, 60.5 feet to corner No. 2; thence 400.31 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of St. Louis Lode claim between corners 3 and 4, 30 feet distant to a point; thence north 50 degrees 28 minutes east along and parallel to the boundary line of the St. Louis lode between corners 2 and 3, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral therein contained" (Trans., p. 10).

And it was distinctly agreed between the parties that the obligees named in said bond should have all of the mineral contained in the area so to be deeded, as aforesaid, without reference to where the apex of the veins might be in which such mineral was found, and the words *"together with all the mineral therein contained"* were inserted in the bond for

a deed for such ground to express that portion of the agreement of the parties.

That thereupon the said Charles Mayger made, executed, and delivered to the said William Robinson *et al.* a certain bond for a deed, a true copy whereof is found in the record in No. 402, page 9 thereof, to which your petitioner prays that reference may be made as if herein specifically set forth.

That thereupon and after the execution and delivery of said bond for a deed the said Robinson *et al.* dismissed their said action in the court and withdrew their adverse claim in the land office and permitted the said ground to be surveyed and entered as a part of the St. Louis lode under the application already made in the land office.

And your petitioner further shows and states that thereafter, and without the consent of Robinson or the other owners of the land and contrary to his covenants and agreements contained in said bond, the said Mayger deeded the said strip of land to the St. Louis Company, and thereafter, and after the said Mayger had received a United States patent for the said St. Louis mining claim, your petitioner, who had succeeded to the rights of the said Robinson *et al.* made a demand upon the said The St. Louis Company for such deed, but it would not and did not convey the said premises as in and by the said bond for a deed its predecessors in interest had covenanted to do, and thereupon, to enforce the specific performance of the said contract, your petitioner commenced an action in the District Court of the First Judicial District of the State of Montana within and for the County of Lewis and Clark against the said Mayger and the said The St. Louis Mining and Milling Company of Montana, and then and there such proceedings were had as that on or about the first day of June, 1895, the judge of said court made and filed his findings of fact and conclusions of law therein and caused a decree to be entered in said action whereby it was adjudged and determined that your petitioner was the owner of the said compromise

ground, together with all the mineral therein contained, and the said The St. Louis Company was required, within thirty days from and after the entry of said decree, to execute and deliver to your petitioner a good and sufficient conveyance in fee simple absolute, free from all encumbrances, the form of which said conveyance was embraced in and made a part of such decree. A copy of the judgment-roll in said specific performance case is set out in the said record in cause No. 402, on pages 41 to 54, both inclusive, to which your petitioner prays reference as if the same was herein specifically set forth.

And your petitioner further shows and states that the said The St. Louis Company, first having made and lodged in the office of the clerk of the court a deed, in compliance with the requirements of said decree, took an appeal from said decree and judgment to the Supreme Court of the State of Montana, and thereafter, this cause having been heard upon such appeal, the judgment of the district court aforesaid was in all things affirmed, the said case being reported in 20th Montana Reports, at page 394; that thereafter the said The St. Louis Company sued out a writ of error from this honorable court to the Supreme Court of the State of Montana, and the said cause was brought to this court for review, and the judgment and decree therein was, on or about the 10th day of October, 1898, affirmed, and the said case was reported in 171 U. S., at page 650.

Amended and Supplemental Complaint.

5. And your petitioner further shows that thereafter and on or about the 26th day of June, 1899, the said The St. Louis Company filed its amended and supplemental complaint, in which it averred that it was the owner of the St. Louis Lode mining claim and was entitled to the rock and ore in all veins whose tops or apexes were within the surface lines of the said *fractional* portion of said St. Louis Lode mining claim, save and except the compromise ground and

the mineral therein contained, which it was averred was the property of your petitioner, as alleged in the amended complaint hereinbefore referred to, the only change being that the said amended and supplemental complaint contained an allegation that since the filing of the original complaint in the action and up to the 26th day of June, 1899, the said defendant, your petitioner, had extracted a large quantity of quartz rock and ore from the said premises, of the value of $50,000, for which recovery was prayed.

To this complaint your petitioner filed an answer, admitting the allegations in the first, second, and third subdivisions thereof and denying generally each and every other matter in said complaint contained; and in addition, and as a further defense, your petitioner pleaded the bond, the deed, and the judgment in the specific-performance case as a bar to recovery by the St. Louis Company of any damage for ores mined out of the compromise ground.

The St. Louis Company replied, expressly admitting the execution and delivery of the bond for a deed by its predecessors in interest, as in your petitioner's answer alleged, likewise admitted the bringing of the action in the specific-performance case and the decree and judgment entered therein, but alleged that the said deed and the said decree did not embrace any mineral found in said compromise ground except such as was in veins having their tops or apexes wholly within the surface boundaries of said compromise ground.

On the issues thus made the said cause came on for trial in the said circuit court before the Honorable Hiram Knowles and a jury on the 8th day of August, A. D. 1899. On the trial of said cause the Honorable Hiram Knowles held that where a top or apex of a vein entered and departed through the same side line of a claim the owners of such claim were entitled to follow the same on its dip beyond the side lines of their claim extended downward vertically, and held that the plaintiff, The St. Louis Company, was en-

titled to recover for all ores mined in said vein northerly from its so-called 108-foot plane, but that it was not entitled to recover for any ores mined south of its 108-foot plane and between that and its 133-foot plane, for that after passing the said 108-foot plane it had not the whole of the apex within the surface boundaries of its claims; that it would be taking the vein on its strike as well as its dip, and that it would be equivalent to taking a part of the surface of your petitioner's compromise ground. The said court likewise held that the bond, the deed, and the judgment in the specific-performance case hereinbefore mentioned were not sufficient to estop the said The St. Louis Company from claiming mineral found in the vein north of its said 108-foot plane. Thereupon the jury returned a verdict against your petitioner for the sum of $23,209. From this judgment your petitioner sued out a writ of error to the Court of Appeals for the Ninth Circuit, and thereupon, the said cause coming on to be heard on such writ of error, the said court of appeals sustained the rulings made by the circuit court and directed the entry of an order affirming such judgment, the opinion rendered in said cause appearing in 102 Fed. Rep., page 430, to which opinion your petitioner prays that reference may be had.

St. Louis Company's Writ of Error.

6. The said circuit court having held, as above set forth, that the said The St. Louis Company was not entitled to pursue the vein extralaterally at any point between its 108 and 133-foot planes, likewise sued out a writ of error to the said Circuit Court of Appeals, and the said cause coming on to be heard in the said Circuit Court of Appeals, the ruling and decision of said circuit court was reversed and it was erroneously held by the said Circuit Court of Appeals that because it was admitted that the St. Louis claim was an older location than the Nine Hour, therefore The St.

Louis Company was entitled to follow the vein on its dip so long as any portion of the apex remained inside the surface boundaries of its claims, ignoring the fact, plainly apparent from the record therein, that the said compromise ground had been patented as a part of the St. Louis claim, that it was only a small fraction of the area originally belonging to the Nine Hour and which had been wrongfully included in the St. Louis boundaries, and that it was impossible for one part of a mining claim to have priority in location or patent over another part of the same claim; and thereupon the said court of appeals reversed the judgment of the circuit court as to this part of the claim and directed the return of said cause to the circuit court aforesaid for trial as to the damage sustained between the two so-called planes, to wit, between the 108 and 133-foot planes. The opinion of said court of appeals is found in 104th Fed. Rep., page 664.

In the Supreme Court of the United States.

The court of appeals in and by its judgments aforesaid having held that a vein entering and departing through the same side line of a claim, as in the case at bar, could have extralateral rights; that where a wide vein crossed a line of a mining claim at an acute angle it could be followed on its dip and strike as long as any portion of the apex was within the surface boundaries of the mining claim which it had thus entered and passed out of; that a judgment and decree of a State court holding that your petitioner was entitled to all mineral within the compromise ground, without reference to where the top or apex of the vein might be in which such mineral was found, did not create an estoppel or confer any title to ores in veins having a part of their apex within the surface boundaries of the St. Louis claim, and having committed other errors not necessary to be enumerated, your petitioner sued out two writs of error, one to each of the judgments aforesaid, from this court to the said court of

appeals, and thereupon the case was removed into this court. Upon the hearing of said cause your honors found that on the hearing in the court of appeals upon the writ of error sued out by The St. Louis Company the judgment in the circuit court aforesaid had been reversed and set aside, and thereupon this court dismissed both writs of error, the opinion and judgment aforesaid being reported in 186 U. S., at page 24.

Court of Appeals Sets Aside Both Judgments.

8. Upon the mandate of this court in said cause being transmitted to the C[illegible]t of Appeals for the Ninth Circuit, the said court of [illegible] by a judgment duly made and entered on the 8th [illegible] October, 1902, ordered and directed that both judgment[illegible]ported respectively in 102d and 104th Fed. Rep., as above mentioned, be vacated and set aside, and that the judgment of the said Circuit Court for the District of Montana be and the same was thereby reversed and the cause remanded for a new trial; all of which will more fully appear by a reference to the remittitur of said court, a copy of which is in the said transcript of record in cause No. 402 on the docket of this court, at pages 17 to 19, both inclusive, to which your petitioner prays that reference may be had.

Second Trial.

9. Thereupon the said cause, upon the issues aforesaid, came on for retrial on said remittitur before the Honorable William H. Hunt, district judge of the district of Montana, and a jury, on or about the 31st day of May, A. D. 1905. Upon such retrial His Honor Judge Hunt held that while the two opinions above referred to in 102d and 104th Fed. Rep. might not be technically "the law of the case," yet he would give effect to the same precisely as if the judgments upon which said opinions rested had not been by the

said court of appeals reversed and set aside; and thereupon he held that your petitioner was concluded upon all questions, both of law and of fact, any reference to which was to be found in the said opinions or either of them, and refused to pass upon any question where any reference was made in such opinions to the matter in litigation. The said circuit court also erred otherwise in the trial of said cause, as is more fully set forth in the assignments of error contained in the record in No. 402, as aforesaid. The jury returned a verdict against your petitioner and in favor of The St. Louis Company for $195,000, and judgment was duly entered thereon in said circuit court on the 7th day of July, A. D. 1905.

The Case in the Court of Appeals.

10. Your petitioner thereupon sued out another writ of error from the Court of Appeals of the Ninth Circuit to the said circuit court and removed the case into the Circuit Court of Appeals for review, and thereupon, and the said cause coming on to be heard, the said court of appeals, on the 13th day of August, A. D. 1906, affirmed said judgment of the circuit court and rendered its opinion in said cause, holding that the two opinions theretofore rendered by it and appearing so as aforesaid in 102d and 104th Fed. Rep., were the law of the case, and that they were bound by such opinions on the second writ of error. A copy of the opinion of said Circuit Court of Appeals appears in the transcript of record in No. 402, as aforesaid, at page 144 thereof, to which your petitioner prays that reference may be made.

Right to Writ of Error.

11. Feeling aggrieved by such judgment, and that manifest error had occurred in the judgment so rendered in the circuit court and the affirmance thereof in the court of appeals, your petitioner sued out a writ of error from this

court to the said court of appeals for the purpose of obtaining a review of such judgment, and the said cause is now pending in this court on such writ of error and is numbered 402 in the docket of the court.

The case, as your petitioner believes, was originally commenced because of the federal questions which the said The St. Louis Company thought were involved in the case, and your petitioner, believing that it had no right to a writ of certiorari if a writ of error would lie, so sued out its writ of error as aforesaid; that when the said case was first here from the court of appeals on writ of error the jurisdiction of this court was attacked on the ground that there was no federal question so presented in the case as to give this court jurisdiction, and since the said case has been here on the present writ of error the jurisdiction of the court has again been attacked on substantially the same ground; that the said cause, on motion of your petitioner, has been advanced, and by the order of the court set down for hearing on the merits on the 10th day of December, 1906; that while your petitioner believes that federal questions determined by said circuit court and said Circuit Court of Appeals were in the case from the beginning, it may perhaps be doubted whether such federal questions are so clearly and distinctly set forth in the original complaint herein as to enable your honors to so determine; that the questions so to be determined as aforesaid are of vital importance, not only to the parties to said action, but to many persons engaged in the business of mining for the precious metals, and they are wholly undetermined by this court in any former decision rendered by it.

Your petitioner has spoken hitherto of only such questions of federal cognizance as appear upon the face of the complaint upon which the case was tried, and has urged upon your honors the importance of such questions, not only to the parties to this action, but also to the vast number of other persons engaged in mining for the precious metals

or interested therein; but there are many other questions of great importance appearing upon the record herein, but which do not appear upon the face of the amended and supplemental complaint. A few of these may be briefly enumerated as follows:

1. Is the right of extralateral pursuit of a vein having its apex within the surface boundaries of a mining claim conferred by section 2322, United States Revised Statutes, so far inalienable that it may not be conveyed by a conveyance of a part of such mining claim?

2. If this right may be severed and conveyed in the conveyance of a part of a mining claim, is any other form of conveyance necessary for that purpose than the ordinary common-law deed in use in the mining States and Territories?

3. Where the parties have agreed that all the extralateral rights of the grantor of a part of a mining claim shall pass by a deed, and insert therein, as a part of the descriptive clause thereof, the words "together with all of the mineral therein contained," are such words insufficient, under the section above referred to, for the purpose of conveying the extralateral rights of the grantor in the portion of the claim so conveyed, despite the fact that the parties to the deed have agreed that they shall have this effect?

It is scarcely thought necessary to comment upon the importance of an ultimate and final determination of these questions to the vast industry affected thereby. Daily, mining claims and parts of mining claims are sold, in many cases for fabulous sums, and if it be true, as determined by the court of appeals in the decision above referred to in 102 Fed. Rep., that—

> "To manifest such an intention, the terms of the contract and of the conveyance would, under the

> circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient,"

then this principle of law should be determined by this court finally and the question set at rest for all time. It is to the interest of the country at large that such a question as this should be set at rest, so that it may not give rise to future litigation. Already many cases have arisen depending upon this principle, and if there is nothing in the federal statutes, as your petitioner contends, upon which it can be based, that fact should be speedily determined.

4. Is the judgment of a State court having jurisdiction of the parties and of the subject-matter, to the effect that the grantor in a deed conveyed to the grantee therein every right, title, and interest which he had in the portion of a mining claim embraced in his conveyance, and that the said grantor and all persons claiming under him, should be forever barred from all interest or claim to the said premises, or to any portion thereof, or to the possession of the same or of any part thereof, of no force or effect under the terms of the Mineral Lands Act, in a federal court; and may the grantor, despite this, enter into and upon the premises so conveyed and so embraced in said decree and mine and take and carry away and convert to his own use the mineral contents thereof?

5. Under the Constitution and laws of the United States, what effect should be given in a federal court to a judgment rendered in a State court between the parties to the litigation in the federal court, and involving the same subject-matter, when the matter thus litigated involves rights in mining claims under the Mineral Lands Act?

There are other questions appearing upon the record and to be determined in said cause, arising directly and indirectly under the Mineral Lands Act, upon the correct solution of which the rights of the parties depend. These questions, one and all, are important not only to the parties here, but to all persons engaged or interested in the business of mining for the precious metals.

Your petitioner further shows that in response to a writ of error sued out in case numbered 402 of the October term, 1903, of this court, there has been lodged in the office of the clerk thereof a transcript of record from the Court of Appeals for the Ninth Circuit, which record has already been printed and to which your petitioner prays that reference may be made as if attached to its petition.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, therein entitled Montana Mining Company, Limited, plaintiff in erorr, *vs.* St. Louis Mining and Milling Company of Montana, defendant in error, and that the record in said cause numbered 402, now on file in the office of the clerk of this court, and printed, as aforesaid, be considered by this court as the return to such writ, to the end that the said case may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891; or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court

of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray, etc.

MONTANA MINING COMPANY,
LIMITED,
By ALEXANDER BURRELL,
Its General Manager.

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel.

STATE OF NEW YORK, *County of New York, ss:*

ALEXANDER BURRELL, being first duly sworn, says: The above-named petitioner is a corporation, and I am an officer thereof, to wit, its general manager in the United States. I have read the foregoing petition and know the contents thereof, and the facts therein stated are true to my own knowledge, except as to such matters as are therein stated on my information and belief, and as to them I believe it to be true.

ALEXANDER BURRELL.

Subscribed and sworn to before me this 14th day of November, 1906.

[NOTARIAL SEAL.] JNO. C. McCUSKER,
Notary Public No. 27, New York County.

FILE COPY.

FILED.
NOV 28 1906
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PETITIONER,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
Attorneys for Petitioner.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23916

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

It is not believed that any very lengthy discussion of the questions involved in our petition for writ of certiorari in this case will be profitable.

We do not file this petition because we entertain any doubt about the proposition that the jurisdiction of the circuit court was originally invoked by reason of the federal questions involved; or that the amended and supplemental complaint, upon which the cause has been twice tried, does not clearly set forth two very important and wholly unsettled questions arising under the Mineral Lands Act, or because these federal questions and many others did not arise and were not adjudicated against us in both trials in the circuit court and in the circuit court of appeals. While these questions were really in the case from the beginning, they

are not alleged with that clearness and certainty in which they appear in the amended complaints. As to these complaints, the original and first amended, we may be permitted to say in passing that a copy of the original complaint appears attached to the reply brief filed by us to the respondent's motion to strike from the files of this court our petition for a writ of mandamus and restraining order to prevent the mining out of the property and its destruction *pendente lite;* but we have also suggested a diminution of the record to this court, and duly moved the court for a writ of certiorari to bring them into the record.

In *Ex parte Jones,* 164 U. S., 691, this honorable court says:

> "In this case the *original* bill averred the complainant to be a citizen of Pennsylvania."

And again, in the same case:

> "But even if another ground were developed in the course of the proceedings, the judgment of the court of appeals would be final if the jurisdiction of the circuit court were *originally* invoked solely upon the ground of citizenship."

Of course, our petition clearly shows that the jurisdiction of the circuit court was not and could not have been invoked on the ground of diverse citizenship.

Like expressions occur in—

Filhiol v. Maurice, 185 U. S., 108.
Gold-Washing & Water Co. v. Keyes, 96 U. S., 199.
Starin v. N. Y., 115 U. S., 248,
and other cases.

Fearing that this honorable court might feel itself bound by what is or is not well pleaded in the original complaint, we have filed this petition out of abundant caution.

Under the statutes of the State of Montana, when an amended pleading is filed it takes the place of and supplants

the pleading so amended; and this is the law everywhere, we believe. This is the reason why the original and first amended complaints are not found in the record in this case and have to be supplied, as already stated. The case having been tried on the second amended and supplemental complaint, that complaint supersedes, takes the place of, and relates back to the original and first amended complaints. For the purpose of ascertaining upon what ground jurisdiction was originally invoked, or whether there was or was not a federal question stated in the pleading sufficient to confer jurisdiction upon the circuit court, this court may hold this last-mentioned complaint is sufficient.

We have ventured to file this petition upon the authority of *Whitney, Warden, etc., v. Dick*, 202 U. S., 132. In that case the Solicitor General had appealed to this court from a decision rendered by the Court of Appeals of the Ninth Circuit, and while the appeal was pending he filed a petition for a writ of certiorari, and in such petition, after setting up the character of the case and the decisions rendered by the lower courts, and particularly that of the court of appeals, he alleged:

> "From that judgment an appeal was allowed to this court. The record in that case, which has been printed, is referred to in this petition. This application for certiorari is made because it is thought an appeal will not lie, there being no pecuniary amount involved."

The case of *Pullman Palace Car Co. v. Cent. Transp. Co.*, 171 U. S., 138, came to this court for review in the same way. The case was appealed direct to this court by the Pullman Company from a judgment adverse to it in the Circuit Court of the Eastern District of Pennsylvania, February 1, 1896, the appeal being allowed by Mr. Justice Shiras. This appeal was so taken on the assumption that it was a case falling under the provisions of section 5 of the act of March 3, 1891.

Thereafter, counsel being in doubt, on the 29th day of

April, 1896, sued out an appeal to the Court of Appeals of the Third Circuit. Afterwards and on December 2, 1896, the appellee filed a motion to dismiss for want of jurisdiction. This motion not having been previously disposed of, the appellant, on October 29, 1897, filed its petition for certiorari, which was granted. This court, through Mr. Justice Peckham, after reciting the various appeals, says:

> "Whichever route may be the correct one, either directly from the circuit court or through the circuit court of appeals, it is unnecessary to decide, because the case is now properly before us either by appeal or by writ of certiorari, and we therefore proceed to determine it upon the merits."

In times past it has not been unusual to find cases brought from the supreme court of a State or Territory, by both writ of error and appeal, where a reasonable doubt might be entertained as to which was the proper method of removing the case into this honorable court. We can conceive of no objection to this practice, and think it is justified by the cases just cited.

The Class of Cases in Which Certiorari Will be Granted.

We understand that the rule which will govern your honors in determining whether a given cause should or should not be removed into this court for review by certiorari was stated clearly in—

Lau Ow Bew *v.* U. S., 141 U. S., 583.

In that case it was said:

> "It is evident that it is solely questions of gravity and importance that the circuit court of appeals should certify to us for instruction: and that it is only when such questions are involved that the power of this court to require a case in which the judgment

In *Security Trust Co. vs. Dent*, 187 U. S., 237, 239, the court held:

> "We think the proper course was to have asked for a writ of certiorari to bring the final judgment of the circuit court of appeals here for review. However, under the powers possessed by us under the judiciary act of March 3, 1891, we now allow a writ of certiorari, and direct that the copy of the record heretofore filed under the writ of error shall be taken and deemed as a sufficient return to the certiorari."

and decree of the court of appeals is made final, to be certified, can be properly invoked."

The gravity and importance of this case to the parties is apparent from the enormous verdict and judgment against your petitioner and in favor of the respondent standing upon the records of the Circuit Court for the District of Montana. The importance to the parties of the determination of the federal question as to whether a party who has a portion of the apex of a claim within his surface boundaries, and which crosses out of said surface boundaries, may follow it beyond the point where he has the whole of such apex within his surface boundaries, is shown by the fact clearly set forth in the petition, that upon the first trial of this case the verdict and judgment against your petitioner was $23,209.00.

On this trial, it will be remembered, that the respondent was only allowed to recover for such ores as had been mined out of the vein north of its 108-foot plane, while on the second trial, the record of which is numbered 402, of the October term, 1906, of this court, the recovery was for all lying north of its 133-foot plane, or the point where the foot wall of the vein crossed the western boundary line of the compromise ground, a difference of practically $172,000, and the effect of the judgment in determining the ownership of the entire vein in dispute includes additional ore of great value.

But it is evident that the questions involved in this case are not only of gravity and importance to the parties, but they are likewise questions of importance to a great many people engaged or interested in the business of mining for the precious metals. The court will take judicial notice of the fact that this industry is a large and exceedingly meritorious one; that its product is the measure of value for every other occupation and pursuit of man, and that the rights of the parties engaged in this hazardous business ought to be definitely settled, determined, and set at rest.

As to this question, namely, when a vein having a wide apex is found crossing a side line of a claim at an acute angle, where shall the line be drawn down parallel to the end lines of the claim, and which shall mark the extent of the miner's right to pursue the vein extralaterally? Shall it be at the point where he has the whole of the apex within his surface boundaries, or shall it be at a point where the apex wholly leaves his surface boundary and he has none of it within his ground?

By a reference to this case, reported in 104 Fed. Rep., p. 664, it will be seen that Judge Hiram Knowles, before whom the case was first tried, held that the first named point was the proper place to draw down this plane, while Judge Morrow, of the court of appeals, held that the latter was the proper point. Aside from these two decisions, we have not been able to find any reported case bearing upon this question.

Can a Vein Which Enters and Departs through the Same Side Line of a Claim Have Extralateral Rights under Conditions Similar to Those Found in This Case?

This is likewise a question of gravity and importance, not alone to the parties to the action, but to every one engaged in the business of mining. Up to the present time, we know of but one decision on this question, namely,

Catron v. Old, 23 Colo., 483; 48 Pac., 687.

With reference to this, Mr. Lindley in his excellent work on Mines, first edition, disposes of the whole question in a single sentence; he says: "It seems hardly necessary to discuss the question of extralateral rights as applied to a case where a vein enters and departs through the same side line" (2 *Lindley on Mines,* sec. 584). We think he is right. Under the provisions of the Mineral Lands Act it would

seem clear that one line of a claim could not serve for both end lines.

The end lines of a claim must be parallel with each other, and, geometrically speaking, no line can be parallel with itself. The location of the claim is to be along the vein, and the end lines of the claim are those which are crossed by the apex of the vein, or towards which it runs in its course through the claim and would cross if continued in its own direction. In order to entitle a locator to pursue his vein on its dip in its downward course beyond his side line, the two lines which the lead crosses on its strike must be parallel. Parallel end lines are essential to the existence of extralateral rights.

Iron Silver Mining Co. v. Elgin Mining Co., 118 U. S., 196.

Montana Mining Co. v. Clark, 42 Fed., 628.

Tyler Mining Co. v. Sweeney, 54 Fed., 284.

No question arising under the federal mining laws can be said to be better settled than this.

How May Extralateral Rights be Conveyed?

At page 11 of the record of this case appears a deed made by the respondent to your petitioner. It conveys to your petitioner the compromise ground described by metes and bounds, and included in the descriptive portion of the deed are the words "together with all the mineral therein contained." By a reference to the offered testimony of Robinson, Decamp, Sterling, Eddy, and Toole (Record, pp. 59-64), it will be seen that these words were inserted in the original bond and in the deed by reason of the fact that the parties thereto had expressly agreed that the west boundary line of the compromise ground should be vertical; that the St. Louis Company should own everything west of that line, and that the Nine Hour owners should have everything lying

to the east thereof; that the words "together with all the mineral therein contained" were inserted for the purpose of cutting off all extralateral right of the part of the ground in dispute which lay to the west of that line; that before Robinson would accept the bond he went to Mr. Toole (who was the counsel for his opponent, Mayger), who had drawn it, with two questions, and his acceptance or rejection of the bond and the compromise it was to carry into execution was dependent upon the answers to those questions.

The first question was, whether Mr. Mayger could pay the penal sum named in the bond and refuse to make conveyance of the premises described, and, second, whether the words referred to were sufficient to cut off extralateral rights in the portion of the disputed premises he was accepting by way of compromise.

By adhering to the opinion reported in 102 Fed. Rep., p. 430, the court of appeals has held that no force or effect whatever should be given to these words, saying:

> "It is not to be supposed that the owners of the St. Louis claim intended by the compromise contract not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights—rights that had not been in litigation and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, 'together with dips, spurs, angles, and also all the metals, ores, etc., therein.' "

Upon the last trial of this case we were in court with witnesses offering to prove that these words meant exactly what we have claimed for them; that they were put there for the

express purpose of shutting off all extralateral right, and that whatever the owners of the St. Louis claim "intended," they agreed that this should be their effect; and yet, despite this, the circuit court of appeals holds that those words are absolutely meaningless; that they neither add to nor take away from anything else found in the deed. In thus holding we submit that the court of appeals puts itself at variance with several decisions rendered by this court to the effect that where there may be any ambiguity in the language used in an instrument of this kind, the court should inquire into the surrounding circumstances and avail themselves of all the light which may be shed upon the question thereby.

> "They are accordingly entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties viewed them, and so judge of the meaning of the words and the correct application of the language to the thing described."
>
> *Nash v. Towne*, 5 Wallace, 699.

> "To ascertain the intent of the parties is the fundamental rule in the construction of agreements. * * * The state of things and the surrounding circumstances in which an agreement is made will be looked at as a means of throwing light upon its meaning, especially for the purpose of ascertaining what is its true subject-matter."
>
> *Canal Co. v. Hill*, 15 Wallace, 94.

> "In construing contracts a court may look not only to their terms, but to their subject-matter and surrounding circumstances, and avail itself of the same light which at the time of making them the parties possessed."
>
> *Merriam v. U. S.*, 107 U. S., 437.

It is respectfully suggested that no further citation of authority is needed to show that the holding in this respect of the honorable court of appeals was at variance with well-

considered decisions of this court and was radically wrong as well.

These well-established principles of law for which we contend have been crystallized into a statute in the State of Montana by the following sections of the Civil Code of that State:

> "SEC. 2201. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."
>
> "SEC. 2203. The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity."
>
> "SEC. 2212. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

Of course, it is to be remembered, in criticising the opinion of the court of appeals (Record, page 144) that it felt itself bound by its former opinions, and applied to the decisions the doctrine of "the law of the case" in its strongest sense, although it involved the absurdity of making it contradict itself. On the first trial of this cause we relied upon the judgment rendered in the specific-performance case. We thought that absolutely conclusive as between the parties, and therefore no proof of the agreements and understandings of the parties leading up to the execution of the bond for a deed were offered in evidence; and with the record in this condition, the court of appeals said:

> "In interpreting the conveyance in question, regard must be had not only to the terms, but the subject-matter involved, and the surrounding circumstances, in order to ascertain the intention of the parties."

And again:

> "All these antecedent circumstances leading up to and culminating in the deed, are properly considered

in determining what was the intent of the parties to the contract" (102 Fed., 430, 432, 433).

The words "together with all the mineral therein contained" were inserted in the bond for a deed by the parties for a purpose; they attached some significance to these words, and the court should not have said that they had no significance, but should have undertaken to ascertain the circumstances under which they got into the instrument. If what was said by the parties with reference to their effect, and if, after inquiry, the intention of the parties with reference to the signification of the words to them at the time the instrument was made could be ascertained, then the same significance with which the parties understood them at the time of the making of the instrument should be given to them.

We respectfully suggest that the language used falls under section 2203 of the Civil Code, above quoted, and that it is clear and explicit and does not involve an absurdity, and should be held to mean exactly what it says, that the respondent, The St. Louis Company, conveyed a piece of ground to the petitioner, by metes and bounds, including an area of about 12,844.5 feet, "together with ALL the mineral therein contained." All does not mean a portion; it does not and cannot be made to mean all mineral found in leads, lodes, or ledges having the whole of their apex within the surface boundaries of the compromise ground as described, and excepting therefrom such mineral as may be found within the ground in leads, lodes, or ledges having their apexes beyond the western side line of said ground. The words "together with," in connection with a previously mentioned subject in a deed or power, operate to enlarge, and not to restrain, that which was previously granted.

Winter v. Loveden, 1 Lord Raymond, 267.

Cardigan v. Armitage, 2 Barn. & Cres., 197.

The words "together with" are equivalent to the word "also," which means "likewise," "in like manner," "in addition to," and denotes that something is added to something which precedes it.

Panton vs. Tefft, 22 Ill., 366.

Scratch this case almost anywhere and you disclose a federal question. What federal question have we here? The court of appeals says in its opinion (102 Fed., 430):

> "To manifest such an intention (*i. e.*, to convey extralateral rights granted under the provisions of sec. 2223 of the Revised Statutes of the United States) the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words 'together with all minerals therein contained' is not sufficient."

The intention to convey extralateral rights, therefore, must be in apt and appropriate language. What that language is the court does not say, but it does say that the expression used by these parties, and which they meant and intended and expressly agreed should convey extralateral rights, was not sufficient. We respectfully submit that this is a question which can be answered only by a proper construction of a statute of the United States, and that here our rights turn upon that construction. If the statutes had been construed so as to make the words used by the parties sufficient for the purpose of conveying extralateral rights, then the decision would have been in our favor; but, as these words were held not to be sufficient, the decision of the court of appeals is against us. What more is necessary to make a federal question, except that this question should appear on the face of some pleading on the part of the plaintiff? This is not claimed; but we do claim that in this, like nearly every other question in the case at bar, resort must be had to the Mineral Lands Act for its answer. And, with all due respect for the court of appeals, we say that its solution of the question and

its interpretation of section 2223 of the Revised Statutes is absolutely wrong. Strike the words "together with all the minerals therein contained" out of the deed, and what have you? You have a conveyance made upon a sufficient consideration, valid and unimpeachable in all respects as between the parties, and by its express terms you have a part of a mining claim conveyed by metes and bounds, "together "with all dips, spurs and angles, and also all the metals, "ores, gold and silver bearing quartz rock and earth therein, "and all the rights, privileges and franchises thereto inci-"dent, appendant or appurtenant, or therewith usually had "and enjoyed, and also all and singular the tenements, "hereditaments and appurtenances thereto belonging or in "anywise appertaining, and the rents, issues and profits "thereof. AND ALSO ALL AND EVERY RIGHT, TITLE, INTER-"EST, PROPERTY, POSSESSION, CLAIM AND DEMAND WHATSO-"EVER AS WELL IN LAW AS IN EQUITY OF THE SAID PARTY "OF THE FIRST PART, OF, IN OR TO THE SAID PREMISES AND "EVERY PART AND PARCEL THEREOF, WITH THE APPUR-"TENANCES."

The right of extralateral pursuit of a vein having its top or apex within the boundary lines of the St. Louis claim was a right in the grantor at the date of the execution of this conveyance. Can anbody give a valid reason why this right did not pass to its grantee on the execution of this deed? It is to be observed that there is no *reddendum* clause anywhere within the four corners of this instrument. Absolutely nothing is reserved or excepted anywhere in it. Is there anywhere a case, aside from this one, of course, where it has been held that such an instrument did not absolutely pass every right, title, and interest which the grantor had in the property conveyed, at the date of the conveyance? In this respect, this decision is certainly unique.

In *Jones et al. v. American Ass'n*, 86 S. W., 1111, the Court of Appeals of Kentucky had occasion to construe a deed containing the following language, which was, how-

ever, in the habendum, and not in the descriptive or granting clause:

> "together with the coal banks reserved by said George to himself in the deed made to J. B. George."

and another deed in the same case in which, in the habendum clause, were found the following words:

> "with the exception of all the coal banks."

The court said:

> "The rule is that a deed is construed as any other instrument to effectuate the intention of the maker, and reservations or exceptions are enforced, although contained in the habendum clause of the deed, as fully as if set out in the granting clause, when on the whole instrument the intention of the parties is sufficiently expressed to be enforced. Although the reservation in the deed from Robert George to James D. George is inserted in the habendum clause, it is so fully and clearly expressed as to leave no doubt of the intention of the parties that the grantor reserved all the coal banks on the lands, and held the right to them and the privilege of a way to the different coal banks with a wagon and team. It is insisted for appellees that the words 'coal banks' must refer to a mine that has been opened, but it is agreed in the record, as a fact which we know to be true, that when the deeds were made the county was sparsely settled, there were no railroads, and no mercantile developments of coal mines. In view of the entire language of the deed, and the circumstances under which it was made, when the grantor reserved all the coal banks, he referred to the veins of coal in the ground and not merely to such as had been opened. There had been little or no development of coal lands at that time, and the purpose of the grantor was to reserve the coal under the land.
>
> "It is earnestly insisted that in the deed from Robert George to Bruce there is a conveyance of only the four tracts of land, and that all that is said about the

> coal in that deed occurs in the habendum clause. The rule is relied on that the habendum clause will never extend the granting clause so as to make the deed cover property not included in the granting clause. But the rule referred to is not recognized by the more modern authorities, and is not enforced in this State. The modern rule is to read a deed as any other instrument."

The doctrine of extralateral rights is clearly in contravention of the common law.

> "The general rule of the common law was that whoever had the fee of the soil owned all below the surface."
>
> *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S., 55-60.

There is nothing in the federal statutes giving the right of lateral pursuit any of the qualities of a covenant running with the land or making it inalienable, except in express terms. We say, therefore, that unless this right is preserved by fit and appropriate words of exception or reservation in the grant, everything contained in the ground conveyed passes by the deed. The Government of the United States occupies no different plane when it comes to dealing with its real estate than does any other owner of that species of property. When it makes a conveyance—*i. e.*, a patent of a mining claim—it does two things with reference to extralateral rights: First, it conveys to its grantee the right to pursue the vein found within the surface boundaries of the claim in its downward course, though it passes under the vertical side lines of his claim and into the premises adjoining; and, secondly, in express language it excepts from the grant made and reserves to an adjoining owner the right of extralateral pursuit. If the reservation is necessary in a patent in order to give an adjoining owner this right, or if unnecessary in a patent, it is only so because the reservation has already

been made by statute, then it is equally necessary in a deed from an individual, and a grantor not reserving it would be thereafter estopped by his deed from asserting it against his grantor. It passes like everything else, whether rock, stone, or mineral, by its conveyance.

> "The effect of the deed from Gillis to plaintiff was to estop him and those claiming under him from questioning the title of the plaintiff to all the gold that might be found in the West vein, within the surface line of his deed. The gold in controversy was found within the surface lines of this deed, and it was also found within the limits of the two walls forming the West vein, although the place at which it was found is also within the lines of the walls which form the Rice vein. This latter circumstance does not, however, relieve Gillis from the estoppel of his deed, for, as the *deed contains no reservations*, and as there was no evidence at the trial of any mining customs, effect must be given to the deed according to its terms by holding that the entire West vein within the surface lines, even though intersected by another, passed to the plaintiff."
>
> *Stinchfield v. Gillis*, 107 Cal., 86; 40 Pac. Rep., 98.

The facts in this case are found in the opinion of the court on a former appeal, 96 Cal., 400; 30 Pac., 839. On and prior to January 17, 1886, Gillis was the owner of the "Carington" claim. On that day he sold to Stinchfield a portion of his claim known as the Pine Tree mine, conveying the same to him by a simple bargain-and-sale deed. At this time one Rice was working on a portion of the Carington claim not included in the sale to Stinchfield, which was known as the Rice vein. The apices of the two veins, called respectively the "West" vein and the "Pine Tree" vein, were within the surface boundaries of the "Pine Tree" claim, while the apex of the Rice vein was on that portion of the claim not sold to Stinchfield. Immediately after the sale to

Stinchfield, Gillis made a new location on the part not sold, and a few days afterwards Stinchfield also made a new location on the part of the claim he had purchased from Gillis. In other words, both parties abandoned the "Carington" location, and each for himself made a new location of his part of the claim, Gillis being the elder. Rice, who was working for Gillis, followed his vein down to where it intersected the "West" vein, under the surface conveyed to Stinchfield, and removed ore at the point of intersection of the two veins of the value of about $10,000. Stinchfield brought suit against Rice and Gillis to recover for this trespass, and, notwithstanding his was the junior location, recovered judgment.

Under the provisions of sec. 2336, U. S. Revised Statutes, providing that all ore in the space of intersection of two veins shall belong to the prior locator, Gillis would have been entitled to the ore but for the estoppel created by his deed. Is this right of extralateral pursuit greater in any respect than the right to the ore at the point of intersection of two veins; and if it is not, and one may be lost in this way, why not the other as well?

> "Unquestionably, in mineral land there may be a severance of estates; the mineral constituting a separate corporeal hereditament, capable of distinct conveyance from the surface or the soil, each estate being in separate owners. But it is also true that, until there has been a severance, ownership of the surface carries with it ownership of the minerals beneath the surface. As expressed in 1 *Lindley on Mines*, at section 2, under the common law minerals were the property of the owner of the land, the property on the surface carrying with it the ownership of everything beneath and above it; and this *prima facie* ownership continued until rebutted by showing that ownership of the mines and minerals had become in fact several and distinct from the ownership of the soil or surface. (See also *Barringer & Adams on the Law of Mines*, p. 4.) In 2 *Washburn on Real Property* (6th ed.),

sec. 1318, the learned author says: 'Whoever owns the surface is presumed to own and would originally actually own whatever minerals there might be beneath the surface, until he shall have granted away the one or the other, and thus separated their ownership.' "

Bogart et al. v. Amanda M. Co., 74 Pac. Rep., 882.

In *Central Eureka M. Co. v. East Central Eureka M. Co.* (Cal.), 79 Pac. Rep., 834, we find the following language:

> "Defendants, relying upon the well recognized principle that a conveyance of land, IN THE ABSENCE OF EXPRESS RESERVATION, carries not only the surface of the earth, but everything under it, and over it, *including the minerals therein contained*, claim that the effect of this deed was to convey to the defendants the portion of the vein here in dispute. As the plaintiff was at the date of the deed the owner of such portion of said vein, such must be held to be the effect of the quit-claim deed *if the description in the deed includes the same.*"

A very important part of this opinion, so far as the proposition we are discussing is concerned, is the following:

> "A very different case would be presented, if we were dealing with a deed which contained a description of a parcel of land simply by *metes and bounds*, or a deed which purported to *convey all lands* lying east of a certain defined surface line. We have no such deed here, but one which in terms limits its operation to such portions of the designated sections as lie east of the mining ground of plaintiff. Taking into consideration simply the character of the plaintiff's property, we are of the opinion that the deed does not purport to convey any portion of any vein that had its apex within the surface lines of the plaintiff's location so far as it lay between the converging end lines of plaintiff's claim."

We respectfully submit that this case falls exactly within the rule announced in *Lau Ow Bew v. U. S., ut supra*, and that any doubt as to the jurisdiction of this court to hear and determine the issues ought to be set at rest. As said by Judge Ross in his dissenting opinion, 104 Fed., "The importance of the question, not only to the correct determination of the present case, but in respect to other pending claims, is too manifest to require comment."

Respectfully submitted,

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
Attorneys for Petitioner.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

quartz lode mining claim known as the St. Louis Quartz Lode mining claim, and of the quartz, rock, and ore and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis Lode mining claim, although such veins, lodes, or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side lines of the surface of the said St. Louis Quartz Lode mining claim, which is situated in Ottawa mining district, in the County of Lewis and Clark and State of Montana, and more particularly described as follows, to-wit:

"Beginning for the description of lots No. 54 and 55A at corner No. 1, a granite stone 16 x 12 x 12 inches, marked 1 M. C. 54, a mound of stones alongside, from which the quarter section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian bears south 74 degrees and 15 minutes east 353 feet distant.

"Thence, first course, magnetic variation nineteen degrees east, south 21 degrees and 15 minutes west, one hundred and two feet, intersect line between townships 11 and 12 north, of range 6 west, a granite stone 15 x 14 x 12 inches, marked 54 M. C. 55A, four hundred and fifty feet to a point from which a shaft bears north sixty-seven degrees west two hundred and eighty-five feet distant, and from said shaft an open cut 3 x 5 feet, one hundred feet long, runs south 54 degrees east; six hundred and fifty-five feet to a point, from which a shaft bears west one hundred and fifty-three feet distant, ten hundred and ninety-seven feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked 2 M. C. 55A, a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west two hundred and eighty-nine feet distant.

"Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, four hundred and three feet to corner No. 3, a slate stone 14 x 10 x 4 inches, marked 3 M. C. 55A, a mound of stones alongside, from which the southeast location corner bears south 10 degrees east four hundred and thirty-five feet distant.

"Thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, six hundred feet to corner No. 4, a granite stone 20 x 8 x 7 inches, marked 4 M. C. 55A, a mound of stones alongside, from which the southwest location corner bears south 79 degrees west one hundred and eighty-two feet distant.

"Thence, fourth course, magnetic variation 19 degrees east, north fifty-one degrees 15 minutes east four hundred and twenty-five feet to corner No. 5, a granite stone 16 x12 x 6 inches, marked 5 M. C. 55A, a mound of stones alongside.

"Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees, 45 minutes east, five hundred and twenty-nine and seven-tenths feet distant, intersects said township line, a granite stone 18 x 14 x 7 inches, marked 54A, 54 M. C., ten hundred and sixty-nine feet to corner No. 6, a granite stone 18 x 12 x 6 inches, marked 6 M. C. 54A, from which a fir tree 13 inches in diameter marked 6 M. C. 54 B. T. bears north 15 degrees east twenty-four feet distant, and a pine tree five inches in diameter marked 6 M. C. 54 B. T. south fifty-four degrees east, twenty-one and five-tenths feet distant.

"Thence, sixth course, magnetic variation nineteen degrees east, south forty-five degrees thirty minutes east five hundred and fifteen and five-tenths feet to corner No. 1 of lot No. 40, the Drumlummon Lode claim, five hundred seventy-nine feet to corner No. 1, the place of beginning, said lot Nos. 54 and 55A extending fifteen hundred feet in length along said St. Louis vein or lode—the granted premises in said lot containing eighteen acres and ninety-three hundredths of an acre."

Save and except that portion thereof known as the thirty-foot strip or compromise ground, which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis Lode mining claim is described as follows, to-wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south thirty-nine degrees thirty-two minutes east, said course being at right

angles to the boundary line of the St. Louis lode between corners 2 and 3 fifty feet distant; thence north fifty degrees twenty-eight minutes east on a line parallel to the aforesaid boundary line of the St. Louis lode between corners 2 and 3 thereof, two hundred and twenty-six feet to a point on the boundary line of the St. Louis lode between corners 1 and 2; thence south twenty degrees twenty-eight minutes west along said boundary between corners 1 and 2 sixty and five-tenths feet to corner No. 2 of the St. Louis lode; thence south fifty-one degrees thirty minutes west four hundred and three feet to corner No. 3 of said St. Louis lode; thence north forty-five degrees thirty minutes west along the line of boundary of the said St. Louis lode between corner 3 and 4 thirty feet to a point; thence north fifty degrees twenty-eight minutes east along a line parallel to the boundary line of the St. Louis lode, between corners 2 and 3, two hundred and thirty feet to the point of beginning, including an area of about 12,844.50 square feet, together with all mineral contained therein.

III.

That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode mining claim, situate and being east of the said St. Louis Lode mining claim and including the thirty-foot strip or compromise ground aforesaid, and that the discovery, location, and recordation of the said St. Louis Lode mining claim and the United States patent therefor was made prior to the discovery, location, and recordation and patent of the said Nine Hour Lode mining claim.

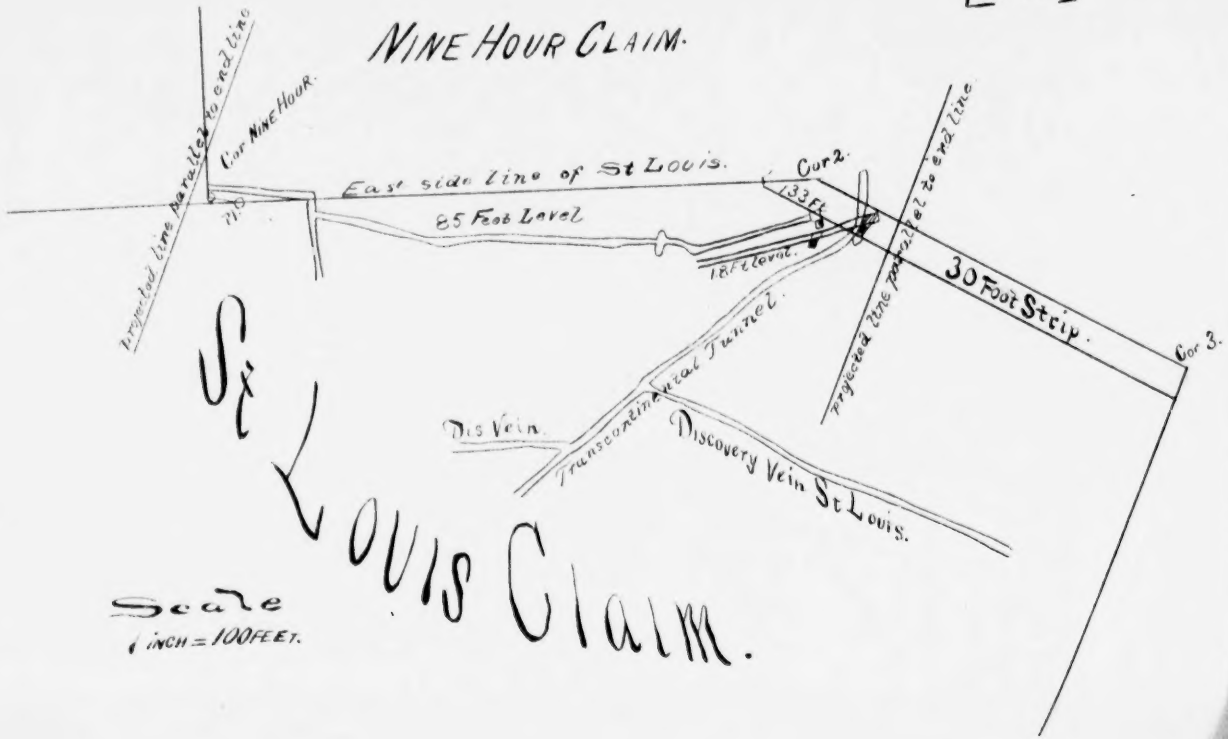
IV.

That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented

ground of the said St. Louis Lode mining claim is to the east and dips under and beneath the said Nine Hour Lode mining claim, including the said thirty-foot strip, or the compromise ground, which is a part and portion of the said Nine Hour Quartz Lode mining claim, which said portion of said vein has its top or apex within the said St. Louis Lode mining claim as follows, to wit: Commencing at a projected parallel end line of said St. Louis Quartz Lode mining claim, at a point on the east side line thereof between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging wall of said vein, lode, or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz Lode mining claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise at said projected parallel end line five feet west of the east side line of said St. Louis Quartz Lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west 512.7 feet to a point, being the intersection of the said east side line of said St. Louis Quartz Lode mining claim between corners 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 50 degrees 50 minutes west 108 feet and along the west line of the said thirty-foot strip to a projected parallel end line of said St. Louis Quartz Lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty-foot strip.

A map or plat showing the point at which the said vein enters said St. Louis Lode mining claim, so as hereinbefore described, and whereat the same departs therefrom upon the east end line of said claim, is hereto attached, marked

[No 402]


NINE HOUR CLAIM.
Projected line parallel to end line
Cor Nine Hour.
East side line of St Louis.
Cor 2.
133 Ft.
85 Foot Level
100 Ft Level.
Projected line parallel to end line
30 Foot Strip.
Cor 3.
Dis Vein.
Transcontinental Tunnel.
Discovery Vein St Louis.
St Louis Claim.
Scale
1 INCH = 100 FEET.

"Exhibit A," and made a part of this complaint, and to which reference is made.

That it is also the owner of, in possession, and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned a distance of 25 feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis Lode mining claim.

V.

That, notwithstanding the right of the said plaintiff in the premises, the said defendant, on or about the thirtieth day of June, 1893, knowingly, wrongfully, and unlawfully, by means of drifts, shafts, tunnels, and underground workings, entered into and upon that portion of the vein, lode, or lead so apexing within the said St. Louis mining claim and commenced extracting quartz, rock, and ore therefrom and removing the same and converting it to its own use and benefit, and are now still removing and converting the same, which said quartz, rock, and ore is of the value of two hundred thousand dollars; on account whereof this plaintiff has been damaged in said sum.

Wherefore plaintiff prays judgment for the said sum of two hundred thousand dollars, together with its costs and disbursements in this behalf expended.

E. W. Toole and
Thos. C. Bach,
Attorneys for Plaintiff.

United States of America,
State of Montana, County of Lewis and Clark, ss:

On this twenty-first day of November, A. D. 1898, personally appeared before me, Harry Harris, a notary public in and for said county and State, William Mayger, general manager and superintendent of the St. Louis Mining and

Milling Company of Montana, the plaintiff corporation above named, who, being by me duly sworn, deposes and says that he is the general manager and superintendent of said company and familiar with its business; that he has read the foregoing bill of complaint and knows the contents thereof, and that the said is true to the best of his knowledge, information, and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-first day of November, A. D. 1898.

[NOTARIAL SEAL.] HARRY HARRIS,
Notary Public in and for Lewis and Clark County, State of Montana.

(Endorsed:) No. 291. In the Circuit Court of the United States, Ninth Circuit, District of Montana. St. Louis Mining and Milling Company of Montana, plaintiff, *vs.* Montana Mining Company, Limited, defendant. Complaint. Filed Nov. 21, 1898. Geo. W. Sproule, Clerk. Service of copy admitted this 21st day of Nov., '98; Cullen, Day & Cullen, att'ys for def't. E. W. Toole and Thos. C. Bach, att'ys for def't.

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify that the foregoing is a full, true, correct, and compared copy of the first amended complaint in case No. 291, St. Louis Mining and Milling Company of Montana, plaintiff, *vs.* Montana Mining Company, Limited, defendant, on file and of record in my office as such clerk.

Witness my hand and the seal of said circuit court, at Helena, Montana, this 26th day of October, A. D. 1906.

GEO. W. SPROULE, *Clerk,*

[SEAL.] By C. R. GARLOW,
Deputy Clerk.

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true and correct copy of "Certified copy of first amended complaint, filed at request of Mr. W. E. Cullen Nov. 13, 1906," in the cause entitled Montana Mining Company, Limited, plaintiff in error, *vs.* St. Louis Mining and Milling Company of Montana, defendant in error, No. 1240 in said Circuit Court of Appeals, as the original thereof remains on file in my office.

Attest my hand and seal of said Circuit Court of Appeals, at San Francisco, California, this 23rd day of November, A. D. 1906.

[Seal United States Circuit Court of Appeals,
Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

FILE COPY.

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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

CERTIFIED COPIES OF ORIGINAL AND FIRST AMENDED COMPLAINT.

W. E. CULLEN,
CHARLES J. HUGHES, JR.,
A. B. BROWNE,
Counsel for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24098

(20,367.)

In the Circuit Court of the United States,

NINTH CIRCUIT, DISTRICT OF MONTANA.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, PLAINTIFF,

versus

MONTANA MINING COMPANY (LIMITED), RAWLINSON T. BAYLISS, ALEXANDER BURRELL, ISAAC WARREN, JOSEPH HARVEY, NICHOLAS FRANCIS, JOHN JEWELL, AND THOMAS HOWKINS, DEFENDANTS.

COMPLAINT.

The plaintiff in the above-entitled action complains of the defendants therein and for cause shows unto this honorable court:

I.

That at the dates hereinafter mentioned the plaintiff was, and now is, a corporation duly organized and existing under the laws of the State of Montana, and as such authorized and entitled to hold, have, possess, use, and enjoy mining property in said State, with all the rights, privileges, and immunities incident and appurtenant thereto and usually had, held, and enjoyed in connection therewith; and that at all of said dates the said defendant, Montana Mining Company (Limited) was, and yet is, a corporation duly incorporated

and organized under the laws of the Kingdom of Great Britain, and as such, by virtue of its compliance with the statutes of the State of Montana, entitled to do and transact a mining business, and to have, hold, use, and enjoy mining property therein, with all the rights, privileges, and immunities incident thereto and usually had and enjoyed in connection therewith.

II.

That plaintiff, as such corporation, was and is the owner of, in the actual possession, and entitled to the possession of what is known and designated as the St. Louis Quartz Lode mining claim, with all the quartz rock and ore contained in any and all veins, lodes, or ledges containing precious metals, throughout their entire depth, the tops or apexes of which lie within the surface lines of the said St. Louis Quartz Lode mining claim, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side lines of said surface location, which said mining claim is situate and being in Ottawa mining district, in the county of Lewis and Clark, State of Montana, and is more particularly described as follows, to wit:

"Beginning, for the description of lots Nos. 54 and 55 A, at Corner No. 1, a granite stone 16 x 12 x 12 inches marked 1. M. C. 54, a mound of stones alongside, from which the quarter section corner on south boundary of section 33 in township 12 north, of range 6 west of the principal meridian, bears south 74 degrees and fifteen minutes east 353 feet distant.

"Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet intersect line between townships 11 and 12 north of range 6 west, a granite stone 15 x 14 x 12 inches, marked 54 M. C. 55 A. 450 feet to a point from which a shaft bears north 77 degrees west 285 feet distant, and from said shaft an open cut 3 x 5 feet,

100 feet long, runs south 54 degrees east, six hundred and five feet to a point from which a shaft bears west 153 feet distant, 1,097 feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked 2. M. C. 55 A., a mound of stone alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

"Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner No. 3, a slate stone 14 x 10 x 4 inches, marked 3. M. C. 55 A., a mound of stones alongside, from which the southeast location corner bears south 10 degrees east 435 feet distant.

"Thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 x 8 x 7 inches, marked 4. M. C. 55 A. a mound of stones alongside, from which the southwest location corner bears south 79 degrees west 18. feet distant.

"Thence, fourth course, magnetic variation 19 degrees east, north 51 degrees 15 minutes east 425 feet to corner No. 5, a granite stone 16 x 12 x 6 inches, marked 5. M. C. 55 A., a mound of stones alongside.

"Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees 25 minutes east 529.7 feet distant intersects said township line, a granite stone 18 x 14 x 7 inches, marked 55 A. 54 M. C. 1,069 feet to corner No. 6, a granite stone 16 x 13 x 6 inches, marked 6. M. C. 55 A. from which a fir tree 13 inches in diameter marked 6 M. C. 54 B. T. bears north 15 degrees east 24 feet distant, and a pine tree 5 inches in diameter marked 6. M. C. 54 B. T. bears south 54 degrees east, 21.5 feet distant.

"Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east, 515.5 feet to corner No. 1 of lot No. 40, the Drumlummon Lode claim 579 feet to corner No. 1, the place of beginning, said lots Nos. 54 and 55 A. extending 1,500 feet in length along said St. Louis vein or lode—the granted premises in said lots containing 18.19 acres."

And that the right and title of plaintiff to said mining claim and veins, lodes, and ledges aforesaid was acquired by virtue of a United States patent therefor to one Charles Mayger, and by him duly deeded to plaintiff herein prior to the commencement of this suit.

III.

And plaintiff further alleges that as a part and parcel of said mining claim for which said United States patent was obtained, as aforesaid, it was and is the owner of, in possession and entitled to the possession of all the said veins, lodes, or ledges bearing gold, silver, lead, cinnabar, and other precious metals so having their tops or apexes within the surface boundaries of the said St. Louis mining claim, as hereinbefore described, as against said defendants and all persons whomsoever, as well as all such veins, lodes, or ledges having any part of their tops or apexes inside of said surface boundary lines by reason of the prior location and patenting of said mining claim, together with the right to follow the same on the dips or angles thereof laterally from the place of intersection of any portion of the tops or apexes of said veins, lodes, or ledges with said side lines of the surface location of its said mining claim, ascertained and defined by vertical planes extending downward parallel with the end lines of its said mining claim at the place of intersection thereof with any portion of said tops or apexes of such veins, lodes, or ledges, and that the said mining claim and the said lodes, ledges, and veins are only valuable for the quartz rock and ore and precious metals therein contained, and on account of which the same is of great value.

IV.

Plaintiffs further allege that, notwithstanding the rights of plaintiff in the premises, said defendants, on or about the 30th day of June, 1893, wrongfully, unlawfully, and wilfully entered upon one of the veins, lodes, or ledges bearing gold, silver, lead, and other precious metals, and so having its top or apex within the surface location of the said mining claim of plaintiff and within the vertical planes aforesaid, and which said vein or lode, having continued in its strike

for some distance parallel with the said boundaries aforesaid, passed out of the eastern side line of said plaintiff's said mining claim, and which has in its dip or angle in an easterly direction and in its course passed outside of vertical planes extended downward upon said east side line of said mining claim, near the southern portion thereof, and in its dip or angle entered beneath the mining property claimed or pretended to be claimed by the said defendants of some of them, and that in utter disregard of the right and title of plaintiff the said defendants ever since have been and now are extracting and taking therefrom large quantities of quartz rock and ore bearing gold, silver, lead, and other precious metals and so lying within the premises of plaintiff so hereinbefore set forth, and have converted the same to their own use and benefit, to the great damage of plaintiff in the sum of $200,000.00.

Wherefore plaintiff prays judgment against said defendants for said sum of $200,000.00, damages sustained by reason of the trespass aforesaid, together with its costs in this behalf expended.

McConnell, Clayberg & Gunn,
Toole & Wallace,
Attorneys for Plaintiff.

State of Montana,
County of Lewis & Clark, ss:

William Mayger, being first duly sworn, makes oath and says that he is the general manager and superintendent of the plaintiff corporation and is agent thereof; that he has read the foregoing complaint and knows the contents thereof; that the matters and facts therein stated are true to the best of his knowledge, information, and belief.

William Mayger.

Subscribed and sworn to before me this 14th day of September, A. D. 1893.

HARRY YAEGER,
Notary Public.

[SEAL.]

(Endorsed:) No. 291. U. S. Circuit Court, Dist. of Montana. St. Louis Mining & Mill'g Co. of Montana *vs.* Montana Mining Co., Limited, *et al.* Complaint. Filed Sept. 16th, 1893. Geo. W. Sproule, clerk. McConnell, Clayberg & Gunn and Toole & Wallace, atty's for pl'ff.

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify that the foregoing is a full, true, correct, and compared copy of the original complaint in the case of the St. Louis Mining and Milling Company of Montana, plaintiff, *vs.* Montana Mining Company (Limited) *et al.*, defendants, No. 291, as the same appears of record and on file in my office as such clerk.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court, at Helena, Montana, this 22d day of October, A. D. 1906.

GEO. W. SPROULE, *Clerk*,
By C. R. GARLOW,
Deputy Clerk.

[SEAL.]

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true, and correct copy of "Certified copy of original complaint, filed at request of Mr. W. E. Cullen Nov. 13, 1906," in the cause entitled Montana Mining Company, Limited, plaintiff in error, *vs.* St. Louis Mining and Milling Company of Montana, defendant in error,

No. 1240 in said Circuit Court of Appeals, as the original thereof remains on file in my office.

Attest my hand and the seal of said Circuit Court of Appeals, at San Francisco, California, this 23d day of November, A. D. 1906.

[SEAL.] F. D. MONCKTON, *Clerk.*

(Endorsed:) Certified copy of original complaint. Filed at request of Mr. W. E. Cullen Nov. 13, 1906. F. D. Monckton, clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, *Plaintiff*,

vs.

MONTANA MINING COMPANY, LIMITED, *Defendant*.

The plaintiff in the above-entitled action for amended and supplemental complaint, by leave of court first had and obtained, complains of the defendant therein, and for cause of action alleges.

I.

That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then Territory (now State) of Montana, under the corporate name of St. Louis Mining and Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said defendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State.

II.

That at the times hereinafter mentioned this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain